

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 15, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP1534-CR**

**Cir. Ct. No. 2011CF350**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JEREMIAH TWOCROW,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Jeremiah Twocrow appeals a judgment of conviction for two counts of felon in possession of a firearm and one count of possession of a short-barreled shotgun. He also appeals an order denying his motion for post-conviction relief. Twocrow argues the circuit court erroneously

denied him his right to self-representation and erred by failing to grant his pre- and post-sentencing motions for plea withdrawal. We reject Twocrow's arguments and affirm.

## BACKGROUND

¶2 The State charged Twocrow with three counts of felon in possession of a firearm and two counts of possession of a short-barreled shotgun. All counts carried repeater enhancers. The charges arose from a burglary investigation. Police suspected Twocrow and his son, Jeremiah Guyes, committed a burglary using a Dodge Intrepid. Police performed a traffic stop on the Dodge, arrested Twocrow and Guyes, and recovered firearms in the trunk and in a duffle bag containing court papers bearing Twocrow's name.

¶3 On October 6, 2011, Twocrow filed a pro se motion to waive counsel. At a motion hearing on October 12, the circuit court found that Twocrow knowingly, voluntarily, and intelligently waived his right to counsel and that Twocrow was competent to represent himself. The court appointed Twocrow's attorney, Raj Singh, to serve as stand-by counsel.

¶4 The court held a jury trial on October 18. At the beginning of trial, while discussing jury selection, Twocrow advised the court, "I believe that I can waive picking the jury and just go ahead and – I seen the statute. I want to waive that, you know. You know what I'm saying?" The court told Twocrow his "comments are a little confusing to me. Voir dire is an extremely important process of jury selection. Why would you waive that? I'm not following[.]" Twocrow then clarified, "I want to waive the challenges. I'm not going to challenge any of whoever [the State] wants on the jury. Just get them on there."

¶5 Upon further questioning from the court, Twocrow admitted he did not understand that he would be permitted to ask questions of potential jurors to determine whether or not they had any bias. The court told Twocrow it was concerned that he did not understand the jury selection process and that he would not be able to adequately represent himself.

¶6 Ultimately, the court activated attorney Singh as trial counsel and the case proceeded to trial. After two witnesses testified, attorney Singh announced to the court that the parties had reached a plea agreement. Twocrow agreed to plead to two counts of felon in possession of a firearm and one count of possession of a short-barreled shotgun. In exchange for his pleas, the State would move to amend the charges to exclude the repeater enhancers and it would move to dismiss and read-in the remaining charges. As for sentencing, the parties jointly agreed to recommend seven years' initial confinement with each party free to argue the length of extended supervision. After a colloquy, Twocrow pleaded to the offenses. The court accepted Twocrow's pleas and found him guilty.

¶7 Before sentencing, Twocrow, represented by new counsel, moved to withdraw his no contest pleas. Twocrow advanced two general arguments in favor of plea withdrawal. The first "focuse[d] on a claim that Mr. Singh had failed to call witnesses that Mr. Twocrow had wanted to call and did not comply with the trial strategy that Mr. Twocrow had spent some time and effort in documenting." At the hearing on Twocrow's motion, the court determined this was not a "fair and just" reason for plea withdrawal because the court had confirmed with Twocrow during the plea colloquy that he was satisfied with attorney Singh's representation and there was nothing Twocrow wanted attorney Singh to do that he had not done. The court also noted that Twocrow, who bore the burden of proving a fair and just reason, had not presented attorney Singh for testimony and that, at the time

Twocrow decided to enter his pleas, “[t]he evidence was going in, quite frankly, very favorably for the State.”

¶8 Twocrow’s second argument for plea withdrawal regarded his right to self-representation. The court concluded “it was not satisfied that the termination of Mr. Twocrow’s status in representing himself [was] a fair and just reason to allow plea withdrawal.” The court explained that, after the court originally determined Twocrow was competent to represent himself, it immediately began to have concerns. The court stated its concerns culminated when, on the morning of trial, Twocrow “flippant[ly]” stated he was waiving his right to peremptory challenges. The court denied Twocrow’s motion to withdraw his pleas, and it proceeded to sentencing.

¶9 Twocrow filed a post-conviction motion in which he argued the circuit court erred by rescinding his right to self-representation and by denying his motion to withdraw his pleas before sentencing. He also claimed he was entitled to withdraw his pleas after sentencing because his pleas were involuntary.

¶10 At the post-conviction hearing, the circuit court again denied Twocrow’s assertion that it had erroneously revoked Twocrow’s right to self-representation. It disagreed with Twocrow that it revoked his right to self-representation based solely on the fact that he did not understand the voir dire procedures. The court explained that, after making the determination that Twocrow was competent to represent himself, the court began having concerns about Twocrow’s ability to exercise that right. The court then highlighted all of its concerns from the previous hearings—specifically, that Twocrow had confusion about the burden of proof and about how the State would prove the repeater enhancer; that Twocrow made confusing objections to the State’s other-acts

motion, that Twocrow did not comprehend certain pretrial orders; and that Twocrow's desire to subpoena certain witnesses, such as his standby counsel and a landlord, suggested he did not understand the basic underpinnings of the evidence the State intended to introduce. The circuit court denied Twocrow's remaining claims in a written decision. He appeals.

## **DISCUSSION**

¶11 On appeal, Twocrow argues the circuit court erroneously revoked his right to self-representation and the court erred by denying his pre- and post-sentencing motions for plea withdrawal.

### **I. Right to self-representation**

¶12 Twocrow argues the circuit court erred by denying him his right to self-representation. He contends the court's determination was based solely on his lack of legal technical knowledge concerning voir dire procedures. Twocrow asserts he was not required to have technical legal knowledge of the voir dire proceedings and, as a result, the court's decision to rescind his right to self-representation was not supported by a specific problem or disability that would have impacted his ability to present a meaningful defense.

¶13 The State invokes the guilty-plea waiver rule.<sup>1</sup> The State asserts Twocrow, by pleading no contest, waived his right to make an independent claim that the court violated his right to self-representation.

¶14 “[A] guilty plea, voluntarily and understandingly made constitutes a waiver of nonjurisdictional defects and defenses including claims of violations of constitutional rights prior to the plea.”<sup>2</sup> *Mack v. State*, 93 Wis. 2d 287, 293, 286 N.W.2d 563 (1980). This is true of all pleas that result in a conviction. *State v. Kazee*, 192 Wis. 2d 213, 219, 531 N.W.2d 332 (Ct. App. 1995) (citation omitted). The reasoning behind the guilty-plea waiver rule is that:

[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea[.]

*Tollet v. Henderson*, 411 U.S. 258, 267 (1973).

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<sup>1</sup> Alternatively, the State argues the court did not erroneously rescind Twocrow’s right to self-representation. It asserts the record shows Twocrow’s stream of consciousness would have impacted his ability to provide a meaningful defense. The State emphasizes the portions of transcript the circuit court relied on at the post-conviction hearing and highlights additional portions of transcript that show Twocrow had difficulty explaining his arguments and following the court’s questions.

<sup>2</sup> Our supreme court has explained that the term “waiver” as used in the guilty-plea waiver rule “does not convey the usual meaning of an intentional relinquishment of a known right.” *State v. Kelty*, 2006 WI 101, ¶18 n.11, 294 Wis. 2d 62, 716 N.W.2d 886. “Instead, the effect of a guilty plea is to cause the defendant ‘to forego the right to appeal a particular issue.’” *Id.* (quoting *State v. Riekkoff*, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983)). Our supreme court stated that if it “were writing on a blank slate, a more accurate label would be the ‘guilty-plea-forfeiture’ rule, or something to that effect.” *Id.*

¶15 We agree with the State and conclude Twocrow waived his right to his self-representation argument by pleading no contest. *See, e.g., Gomez v. Berge*, 434 F.3d 940, 942 (7th Cir. 2006) (holding with entry of knowing and voluntary plea, defendant waived right to contest alleged constitutional violations that occurred before plea, including alleged denial of right to self-representation). Twocrow's self-representation claim is independent of the voluntary and intelligent nature of his pleas. We therefore will not consider Twocrow's independent self-representation argument further.

## II. Plea withdrawal

¶16 Twocrow next argues the circuit court erred by denying his motions for plea withdrawal. Ordinarily, the decision of whether to allow plea withdrawal is within the discretion of the circuit court. *State v. Rock*, 92 Wis. 2d 554, 559, 285 N.W.2d 739 (1979). An exception, however, is where the defendant can show that he was denied a relevant constitutional right. *Id.* In that circumstance, withdrawal of the plea is a matter of right. *Id.*

¶17 Twocrow's first plea-withdrawal argument is that he is entitled to withdraw his plea as a matter of right because the circuit court denied him his right to self-representation. This argument is very similar to his independent self-representation argument. The problem with this argument, however, is that to withdraw a plea as a matter of right, the defendant must prove *more* than a relevant constitutional right was violated. *See id.* As explained in *Rock*, the defendant must prove:

- (1) that a violation of a constitutional right has occurred;
- (2) that this violation caused him to enter a plea of guilty or of no contest; and
- (3) that at the time of his plea, he was unaware of the potential constitutional challenges to the case against him because of the violation.

*Id.*;<sup>3</sup> see also *State v. Bartelt*, 112 Wis. 2d 467, 334 N.W.2d 91 (1983) (noting the “three-pronged test was meant to be an exception to the guilty-plea-waiver rule[.]”).

¶18 Without reaching either of the first two prongs, the record is clear that, at the time of Twocrow’s no contest pleas, he was very much aware of the constitutional challenge he now attempts to raise. Had Twocrow been convicted following the jury trial, he could have challenged his convictions on the independent basis that he was denied his right to self-representation. However, by pleading to the charges, he rejected that course of action, and, as indicated above, waived his right to make this challenge on appeal. Accordingly, Twocrow is not permitted to withdraw his no contest pleas as a matter of right.

¶19 Twocrow next argues the circuit court erred by denying his pre-sentencing motion for plea withdrawal because he offered a fair and just reason for plea withdrawal. Specifically, Twocrow contends he pleaded to the charges because attorney Singh was ignoring him and not raising his defenses, and because Twocrow wanted to try the case himself. He also argues the circuit court’s determination that he failed to present a fair and just reason was erroneous because the court improperly based its decision on the strength of the State’s case.

¶20 A defendant’s motion seeking plea withdrawal before sentencing should be freely granted “if the defendant presents a ‘fair and just reason’ to justify the withdrawal.” *State v. Timblin*, 2002 WI App 304, ¶19, 259 Wis. 2d

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<sup>3</sup> In *State v. Rock*, 92 Wis. 2d 554, 560, 285 N.W.2d 739 (1979), the relevant constitutional right at issue was whether Rock had been denied his Sixth Amendment right to the effective assistance of counsel.

299, 657 N.W.2d 89 (citation omitted). “[F]reely does not mean automatically. A fair and just reason is some adequate reason for the defendant’s change of heart other than the desire to have a trial.” *Id.* (citation, internal quotation marks and ellipsis omitted). “The defendant bears the burden of proving a fair and just reason by a preponderance of the evidence.” *State v. Leitner*, 2001 WI App 172, ¶26, 247 Wis. 2d 195, 633 N.W.2d 207.

¶21 “Whether a defendant’s reason adequately explains his or her change of heart is up to the discretion of the circuit court.” *State v. Kivioja*, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999). We uphold discretionary determinations if the circuit court reached a reasonable conclusion based on the proper legal standards and a logical interpretation of the facts. *Id.* If the circuit court finds the defendant’s proffered reason is incredible, it may deny the motion. *Leitner*, 247 Wis. 2d 195, ¶26.

¶22 Applying these standards to the circuit court’s discretionary determination, we reject Twocrow’s challenges. First, we disagree with Twocrow that the circuit court denied his motion based on the strength of the State’s case. The court made comments about the State’s case to provide context of Twocrow’s desire to plead and to assess the credibility of Twocrow’s desire to withdraw his pleas. Ultimately, the circuit court found that it did not believe Twocrow’s claim that he pleaded to the charges because he was unhappy with how attorney Singh was handling his case. The court stated that Twocrow’s assertion contradicted his statements during the plea colloquy that he was satisfied with attorney Singh’s representation and that there was nothing he asked attorney Singh to do that he had failed to do. Further, we observe that Twocrow’s desire to try the case himself is indistinguishable from the desire to have a trial, which is not a fair and just reason for plea withdrawal. *See Timblin*, 259 Wis. 2d 299, ¶19. In short, we discern no

basis to overturn the circuit court's findings and exercise of discretion as to Twocrow's pre-sentencing plea withdrawal argument.

¶23 Twocrow next argues the circuit court erred by denying his post-sentencing motion to withdraw his no contest pleas. A defendant who seeks to withdraw a plea after sentencing bears the heavy burden of establishing by clear and convincing evidence that withdrawal of the plea is necessary to correct a "manifest injustice." *State v. Milanes*, 2006 WI App 259, ¶12, 297 Wis. 2d 684, 727 N.W.2d 94.

¶24 Twocrow argues withdrawal of his pleas is necessary to correct a manifest injustice because his pleas were not knowingly, voluntarily, and intelligently entered. He does not point to any deficiency in the plea colloquy, and instead argues his pleas were deficient because they were based on misrepresentations from attorney Singh.<sup>4</sup> Twocrow asserts that his pleas were not knowing or voluntary because at the post-conviction hearing he demonstrated he pleaded to the charges on the belief "he was guaranteed a new trial based on the erroneous recession of his right to self-representation, and that his waiver of his constitutional rights was therefore temporary."

¶25 The State responds Twocrow is precluded from arguing attorney Singh promised Twocrow a new trial based on the self-representation issue. The

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<sup>4</sup> We observe that, in the circuit court, Twocrow's post-sentencing plea withdrawal arguments related to assertions that his pleas were not knowing or voluntary because the plea colloquy was defective and because attorney Singh pressured him to enter the pleas and was ineffective in his handling of Guyes' testimony and for failing to investigate other witnesses. The circuit court denied these claims, and Twocrow does not renew these arguments on appeal. Those arguments are deemed abandoned, and we do not address them. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

State points out that the circuit court specifically refused to consider this argument because Twocrow did not brief it in the circuit court. *See State v. Darcy N.K.*, 218 Wis. 2d 640, 644, 581 N.W.2d 567 (Ct. App. 1998) (claims forfeited in the circuit court may not be raised on appeal). In his reply brief, Twocrow does not respond to the State’s contention; therefore, we deem the issue both forfeited below and conceded here. *See Charolais Breeding Ranches v. FPC Secs. Corp.*, 90 Wis. 2d 97, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded).

¶26 In any event, the circuit court found that “it is beyond comprehension” that attorney Singh advised Twocrow to take a plea deal on the basis that Twocrow’s pleas could be withdrawn on the self-representation issue at a later date. The court rejected Twocrow’s assertions as self-serving and lacking credibility. Credibility determinations are for the circuit court. *See State v. Thiel*, 2003 WI 111, ¶23, 264 Wis. 2d 571, 665 N.W.2d 305. We will uphold the circuit court’s credibility determination unless it is clearly erroneous. *Id.* We conclude the circuit court’s credibility determination is not clearly erroneous. We observe that, in its written decision, the court found Twocrow lacked credibility because “at the [post-conviction] hearing Twocrow stated he lied to the Court during the plea hearing.”

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

